88-440

No.

Supreme Court, U.S.
FILED
AUG 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GOBEL LEE NEWSOME - - Petitioner/Appellant

versus

UNITED STATES OF AMERICA - - - - Respondent/Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN TIM McCALL
200 Hart Block Building
730 West Main Street
Louisville, Kentucky 40202
(502) 589-6190

Counsel For Petitioner,
Gobel Lee Newsome

Member of the Bar of the Supreme Court of the United States

WESTERFIELD-GONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

A. Whether retrial of Petitioner is constitutional and permissible in light of the Government's conduct and withholding of evidence.

TABLE OF CONTENTS

	PAGE
Table of Citations	ii
Opinion Below	1– 2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2– 3
Statement of the Case	3– 8
Reason for Granting Relief	9–13
Conclusion	13
Appendix	1a–28a
Appendix A-1 (Order and Opinion of the Sixth Circuit Court of Appeals June 28, 1988)	1a– 7a
Appendix A-2 (Indictment Number 87-00001-01-L (B))	8a– 9a
Appendix A-3 (Reciprocal Order of Discovery)	10a–12a
Appendix A-4 (Superseding Indictment 87-00063-01-L(B))	13a–15a
Appendix A-5 (Memorandum and Order entered September 17, 1987)	16a–17a
Appendix A-6 (Defendant's Motion to Bar Further Proceedings)	18a–23a
Appendix A-7 (Memorandum and Order of October 8, 1987)	24a–28a

TABLE OF CITATIONS

Cases:

	PAGE
United States v. *Dinitz*, 424 U.S. 607 (1976)	9
Oregon v. *Kennedy*, 456 U.S. 667 (1982)	10
Green v. *United States*, 355 U.S. 184 (1957)	11
United States v. *Yourn*, 400 U.S. 470 (1971)	12
United States v. *Martin*, 576 F. 2d 135 (8th Cir. 1977)	12
United States v. *Broderick*, 425 F. Supp. 93 (S.D. Fla. 1977)	12
Commonwealth v. *Warfield*, 227 A. 2d 177 (Pa. 1967)	12

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1988

GOBEL LEE NEWSOME - - *Petitioner-Appellant*

v.

UNITED STATES OF AMERICA - - - - *Respondent-Appellee*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Gobel Lee Newsome, respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the Sixth Circuit Court of Appeals entered in this proceeding on June 28, 1988. (Appendix A-1, p. 16).

OPINION BELOW

On motion of Petitioner, the United States District Court for the Western District of Kentucky, Honorable Thomas A. Ballantine presiding, declared a mistrial on September 17, 1987, in the original Trial Court proceedings based on the Government's withholding of evidence previously ordered to be disclosed to the Petitioner. (R:24). On September 23, 1987, Petitioner filed a Motion to Bar Further Proceedings Pursuant to the Double Jeopardy Clause of the Fifth

Amendment to the United States Constitution which was denied by Honorable Judge Ballantine on October 7, 1987. (R:31). Petitioner thereafter filed a Notice of Appeal (R:33) and on June 28, 1988, the Sixth Circuit Court of Appeals affirmed the Trial Court's denial of the Petitioner's Motion to Bar. (Appendix A-1, p. 16).

JURISDICTION

The Opinion and Order of the Sixth Circuit Court of Appeals was entered on June 28, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

A. Whether retrial of Petitioner is constitutional and permissible in light of the Government's conduct and withholding of evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal cases to be a witness against himself, nor be deprived of

life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In order to fully understand the harassment and prejudice suffered by Petitioner, a detailed listing of the facts and circumstances surrounding the presentation of the Government's charges is necessary.

The Petitioner, Gobel Lee Newsome, was indicted by the United States District Court Grand Jury for the Western District of Kentucky on January 5, 1987, and charged with three counts of Illegal Possession of a Handgun by a Convicted Felon, in violation of 18 U.S.C. Section 1202(a)(1), Indictment Number CR 87-00001-01-L(B). (R: N/A, Appendix A-2, p. 22). This indictment was based upon information received through electronic surveillance and search warrants dated two years earlier in 1985. On January 20, 1987, the Petitioner was arraigned in the United States District Court, Western District of Kentucky, in Louisville, Kentucky, on this Indictment and entered a plea of not guilty to the charges. The case was passed to January 28, 1987 for further proceedings. At the time of the arraignment, Petitioner's counsel, in open court, acknowledged receipt of two tapes of alleged conversations to which the Petitioner was a party dated January 9, 1985 and January 14, 1985. Thereafter, on January 22, 1987, the District Court entered a Reciprocal Order of Discovery specifically providing that the Petitioner was to receive "*any* tape recording

made by Government agents or *any* conversation with the Defendant". *Emphasis added.* (R: N/A, Appendix A-3, p. 25).

Thereafter, several requests were made by Petitioner's counsel for production of any other tapes which may have been in existence, however, the Assistant United States Attorney prosecuting the case, Honorable Terry Cushing, denied the existence of any other tapes. Based on the existence of the two tapes given to the Petitioner at that point and time, Petitioner made an oral Motion to Suppress on March 9, 1987, and the matter was assigned for a hearing to March 30, 1987. However, by written notice dated March 30, 1987, Petitioner withdrew his former oral Motion to Suppress which was withdrawn by Order of the District Court on March 23, 1987. On March 30, 1987, the Petitioner again appeared with counsel for further proceedings and the Assistant United States Attorney was ordered at that time to furnish Petitioner with any *Brady* material when the matter became available to the United States. The case was then set for further proceedings on April 13, 1987. Nonetheless, on or about April 1, 1987, and subsequent to the Government's assurance that there were no other tapes, Petitioner's counsel received two more tapes regarding a conversation allegedly occurring on January 21, 1985.

Petitioner appeared in Court on April 13, 1987, as previously ordered, and was informed that the case would be set for trial on April 20, 1987. However, on

April 14, 1987, without notice to the Petitioner, and one day after the last hearing of further proceedings, the United States Attorney filed an *Ex Parte* Order for dismissal pursuant to Rule 48A of the Federal Rules of Criminal Procedure requesting the District Court to dismiss the original indictment, Indictment Number 87-00001-01-L(B) on the ground that the Government was going to present a Superseding Indictment. On or about April 15, 1987, the Trial Court signed the Order which was entered into the Court's record on that date.

Subsequently, on or about April 20, 1987, a Superseding Indictment, Indictment Number 87-00063-01-L(B), was filed with the United States District Court, Western District of Kentucky, charging the Petitioner with the same three violations of 18 U.S.C. Section 1202(a)(1), as set forth in the original Indictment. (R:1, Appendix A-4, p. 27). The substance of the charges presented within the Superseding Indictment were *identical* to those presented in the original indictment except for the manner and language within which the prosecution framed the allegations. Specifically, the Superseding Indictment included a twenty year old 1961 conviction of Voluntary Manslaughter to prove the Petitioner's status of a convicted felon. Furthermore, the time periods during which the violations allegedly occurred were greatly expanded in Counts Two and Three, of the Superseding Indictment, with Count Two alleging that "on or about and between the 17th day of October, 1981, and the 23rd day of July, 1985", and Count Three alleging to have occurred, "On or

about and between 1982, the exact date being unknown to the Grand Jury, and the 23rd day of January, 1985".

Adding to this dilemna, on or about April 28, 1987, Petitioner's counsel was still given *additional* discovery, namely, two tapes of a conversation allegedly occurring on January 21, 1987, by the United States Attorney's Office pertinent to Petitioner's case. *None* of this information had been previously given to Petitioner's counsel and he was unaware of its existence until that time.

As a result, Petitioner filed a Motion to Dismiss on April 30, 1987, based upon the Government's failure to disclose evidence and discovery as required by the Court and in accordance with the Federal Rules of Criminal Procedure. (R:4). Also on that date, Petitioner filed a Motion to Dismiss both Indictments based on the violation of the Speedy Trial Act, due to the Government's failure to proceed with trial on April 20, 1987, with regard to the original indictment. (R:5).

Petitioner was arraigned on the Superseding Indictment on May 6, 1987, and ordered to appear for purposes of jury selection the very next day, on May 7, 1987. As the Petitioner objected to the commencement of jury selection on May 7, 1987, the District Court remanded the case from the May 11, 1987, trial docket. Thereafter, the District Court overruled the Petitioner's Motion to Dismiss based on both the Government's failure to provide discovery and proceed to trial pursuant to the Speedy Trial Act and the case was scheduled for trial on September 14, 1987. (R:19).

The heart of the Government's proof centered around conversations Petitioner allegedly had with an informant, Mr. Frank Manning, more than two years earlier, which were recorded by electronic means through a body microphone placed on Mr. Manning. Mr. Manning testified during the Government's case in chief; however, at the request of the Assistant United States Attorney, to which the Petitioner agreed, the address of the informant was never made public or known to Petitioner. Thereafter, Agent Michael Scanlon, Bureau of Alcohol, Tobacco and Firearms, (hereinafter referred to as A.T.F.) also testified during the Government's case in chief. Mr. Scanlon appeared to be the last witness to testify in the case on behalf of the Government. However, when questioned about the four tapes that had previously been furnished to Petitioner, Mr. Scanlon also admitted that there were other tape recordings of Petitioner which were in his custody that had not been furnished to either Petitioner or his counsel. When asked for the reason for his failure to provide this material, Agent Scanlon testified that he was told not to provide these tapes to the Petitioner by the Assistant United States Attorney. (Agent Scanlon at T.R. 7-9).

Petitioner's counsel then made a Motion for Mistrial based on the conduct of the Government in intentionally and unilaterally withholding evidence material to the preparation of Petitioner's case which had been previously ordered to be provided to the Appellant on several occasions. According to the Assistant United States Attorney, upon discovery of the existence of cer-

tain tape recordings, he himself made the decision that they were not helpful to the Petitioner's defense or discoverable and therefore he did not inform Petitioner or his counsel of the existence of such tapes or provide them to Petitioner. (Agent Scanlon at T.R. 10-12). Although Petitioner's motion was originally denied, the Trial Court subsequently declared a mistrial on September 17, 1987, based on the Government's failure to provide the Petitioner with certain tape recordings and specifically recognized that the Petitioner had been deprived of his right to a fair trial in confrontation as the other party to the conversations, Mr. Manning, had already testified and his address was never made known to the Petitioner. (R:24, Appendix A-5, page 30).

On September 23, 1987, Petitioner filed a Motion to Bar Further Proceedings Pursuant to the Double Jeopardy Provisions of the Fifth Amendment to the United States Constitution which was denied by Judge Ballantine on October 7, 1987. (R: 26, 31, Appendix 6 & 7, pp. 32 & 38). Thereafter, Petitioner filed a Notice of Appeal to the Court of Appeals of the Sixth Circuit on the grounds that it would be a violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution to force him to endure a retrial in light of the overwhelming evidence of prosecutorial misconduct and overreaching. (R:33). However, by Opinion and Order dated June 28, 1988, the Court of Appeals of the Sixth Circuit affirmed the Trial Court's denial of Petitioner's Motion to Bar.

REASON FOR GRANTING THE WRIT

To Allow Retrial of Petitioner in light of the overwhelming evidence of prosecutorial misconduct and overreaching would be in complete derrogation of the Double Jeopardy Provisions of the Fifth Amendment to the United States Constitution.

This Court has clearly recognized that the Double Jeopardy Clause protects a Defendant against Governmental actions intended to provoke mistrial requests and thereby subject Defendants to the substantial burdens imposed by multiple prosecutions. *United States v. Dinitz,* 424 U.S. 607 (1976). According to this Court:

> [The Double Jeopardy Clause] bars retrials where 'bad faith conduct by Judge or prosecutor' . . . threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorably opportunity to convict the defendant.

Dinitz, supra, at page 611. The Double Jeopardy Clause represents a constitutional policy of finality: If an accused is acquitted, he may not be prosecuted again for the same offense. Similarly, the accused also has a protected interest in having his guilt or innocence decided in one proceeding. Given the convoluted path the Government has taken in its attempt to obtain some kind of conviction of the Petitioner, one can only question the motives and intentions of the prosecution.

As early as January 22, 1987, the District Court ordered the Government to provide Petitioner with *any* tape recording made by Government agents of *any*

conversation with the Petitioner. Despite the several requests subsequently made by the Petitioner in addition to a subsequent Court Order to provide such discovery, the Assistant United States Attorney withheld several tapes and in fact denied their existence even though he knew there were other tapes that did in fact exist.

The Double Jeopardy Clause specifically protects an accused from being subjected to the type of conduct exhibited by the Government in this case. The prosecution in the case at bar did not act negligently or inadvertently. *Oregon v. Kennedy*, 456 U.S. 667 (1982). He intentionally withheld evidence which had on several occasions been previously ordered to be provided to the Petitioner. The facts of this case are almost unbelievable.

This Court cannot overlook the Government's *ex parte* dismissal of the original indictment and presentment of a Superseding Indictment which, although in substance alleged the identical three charges as presented in the original indictment, was nevertheless framed in language most assuredly meant to inflame and prejudice any jury panel. Despite the fact that the Government had initially relied upon a 1982 conviction of Receiving Stolen Property to prove the Petitioner's status as a convicted felon, it included a twenty year old 1961 conviction of Voluntary Manslaughter in its Superseding Indictment. Furthermore, the gross enlargements of time during which the alleged violations were supposed to have occurred, with Count Two alleging a four year time span and Count Three alleging a

three year time span are no more dispositive of any criminal activity than that set forth in the original indictment. If anything, the time periods are more vague. Nevertheless, the Government expected the Petitioner to be prepared for trial the day after his arraignment on the Superseding Indictment. Fortunately, on motion of the Petitioner, the trial was continued until September 14, 1987. However, the Government has never attempted to present proof outside of the time limitations as framed in the initial indictment.

Despite this four month time span, the Government failed to provide and/or even acknowledge the existence of other tapes allegedly documenting conversations between the Petitioner and its informant, Frank Manning. In fact, the existence of these tapes was not learned until after a witness for the Government admitted at trial that there were other tapes, although he was told not to furnish Petitioner with those tapes on the insistence of the Assistant United States Attorney. This fact was made known to the Petitioner *after* the Assistant United States Attorney had informed the Court and Petitioner's counsel that there were *no other tapes.* It is inconceivable how the Assistant United States Attorney can make such a claim, knowing that other tapes were in existence.

The facts of this case clearly show the anxiety, embarrassment, expense and delay endured by Petitioner. *Green* v. *United States,* 355 U.S. 184 (1957). The Petitioner has already had to endure not one but two indictments. He has had to endure the delay of being forced to continue his trial date from April to Sep-

tember, upon an *ex parte* request for dismissal by the United States only five days before his first trial was to begin. Even though the Government has been ordered several times to provide any and all tapes to the Petitioner, the Government has not done so; instead it has unilaterally withheld discovery and evidence material to the presentation of his case. Considering the prosecution's past misconduct, Petitioner is not certain the Government has even to date fulfilled this obligation. Clearly, such bad faith conduct rises to the level of prosecutorial overreaching. *United States* v. *Yourn*, 400 U.S. 470 (1971); *United States* v. *Martin*, 576 F. 2d 135 (8th Cir. 1977); *United States* v. *Broderick*, 425 F. Supp. 93 (S.D. Fla. 1977); *Commonwealth* v. *Warfield*, 227 A. 2d 177 (Pa. 1967).

The Petitioner specifically takes issue with the Court of Appeals' determination that the Petitioner was not goaded into moving for a mistrial and that the Government was not guilty of overreaching. The Petitioner submits that he was irreparably prejudiced by the Government's failure to furnish the tapes as requested; due to the Government's request that the address of its informant, Frank Manning, not be made known to the Petitioner, together with the fact that Mr. Manning had testified prior to Agent Scanlon, the Petitioner had no means by which to either recall or cross examine Mr. Manning regarding the content and circumstances surrounding the additional tapes. Therefore, Petitioner had no way to rebutt any evi-

dence supplied within the tapes withheld by the Government.

The Petitioner submits that the Double Jeopardy Clause serves to protect an accused from the expense and anxiety caused by Governmental harassment. Most assuredly, the conduct of the Government in the case at bar rises to the level of harassment and prejudice which the Constitution seeks to prohibit. Thus, Petitioner respectfully requests this Court to grant the Petition for Writ of Certiorari.

CONCLUSION

The reasons for granting a Writ, set forth above, clearly enunciate substantial questions of constitutional law which should be settled by this Court. Therefore, Petitioner requests that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN TIM MCCALL
200 Hart Block Building
730 West Main Street
Louisville, Kentucky 40202
(502) 589-6190

Counsel for Petitioner

APPENDIX

APPENDIX A-1

No. 87-6148

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

GOBLE LEE NEWSOME, - - - *Defendant-Appellant.*

On Appeal from the United States District Court for the Western District of Kentucky

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OPINION—Decided and Filed June 28, 1988

BEFORE: ENGEL, Chief Judge, and NELSON and RYAN, Circuit Judges.

PER CURIAM. This is an appeal from a district court order denying a motion to dismiss an indictment on double jeopardy grounds. Defendant alleges that in the course of his trial he was forced to move for a mistrial as a result of prosecutorial misconduct. The district court declared a mistrial but refused to bar the United States from placing defendant on trial again. Having concluded that there is no constitutional impediment to retrying defendant, we shall affirm the district court's order.

Defendant was indicted on three counts of illegal possession of firearms by a convicted felon. 18 U.S.C. §1202 (a)(1). The indictment grew out of an investigation conducted by the Bureau of Alcohol, Tobacco and Firearms (ATF) and the Louisville Police Department (LPD). The

investigators utilized the services of a paid informant named Frank Manning to gather information used by the prosecution.

In December of 1986 informant Manning obtained employment as a carpenter at defendant's business establishment, a bistro known as the "Pussycat A-Go-Go Lounge." At various times over a period of three or four weeks Manning engaged defendant in conversations on the subject of firearms. ATF agents and LPD detectives monitored the conversations by radio and attempted to record them with a hand-held tape recorder. Their recording efforts were largely unsuccessful; the tapes, according to the government are almost wholly inaudible.

Defendant bragged to Manning about owning 38 firearms. He said he kept them in different places in order to avoid losing them all should he be caught with a weapon. Defendant showed Manning a Ruger .357 caliber revolver that he kept at the lounge. On the strength of Manning's report on this, search warrants were obtained for defendant's residence and place of business. In the course of searches conducted on January 23, 1985, pursuant to the warrants, the police found four weapons at the residence and one at the lounge. A friend of defendant gave police the five additional weapons that belonged to defendant.

Defendant was indicted and arraigned in January of 1987. On January 22, 1987, the district court entered a reciprocal order of discovery providing, among other things, that the government would permit defendant to inspect and copy "[a]ny tape recording made by the Government agents of any conversation with the defendant." On January 28, 1987, defendant was provided tapes of conversations recorded on January 9, 1985, and January 14, 1985.

On March 9, 1987, defendant advised the district court that he intended to file a motion to suppress. A hearing

date was set for March 30, 1987. Defense counsel subsequently asked the Assistant U.S. Attorney in charge of the case whether the government intended to use the tape recordings in its case in chief and whether a conversation held on January 21, 1985, had been recorded. The Assistant U.S. Attorney answered both questions in the negative, and counsel withdrew his motion to suppress. The fact was that the January 21 conversation had been tape recorded.

At proceedings held on March 30, 1987, defense counsel requested any exculpatory evidence. The government stated on the record that it did not intend to introduce any tapes in its case in chief and again stated erroneously that as a result of an equipment malfunction no tape was made on January 21, 1985. The government noted that it had possession of a statement that defense might find exculpatory, although the government did not consider it to be so, and agreed to furnish the statement.

The government also informed the court and defense counsel that it intended to present a superseding indictment to the grand jury on April 6, 1987. On April 13, 1987, the court and defense counsel learned that no superseding indictment had been presented. Faced with an April 20 trial date, the government dismissed the original indictment. On May 6, 1987, defendant was arraigned on the superseding indictment.

The government provided additional discovery, and on some date after March 30, 1987, the government gave defense counsel a largely inaudible tape of the January 21, 1985, conversation.

On May 7, 1987, defense counsel objected to the discovery he had received to that point. The government responded that

> "Everytime [sic] evidence has come to our attention, we have supplied it to [defendant's attorney]. . . .
>
> * * *

> "The discovery in this case was made early. It has been made often. And it has been complied with to the fullest."

At a hearing on July 23, 1987, defense counsel made further complaints with regard to discovery, and the government responded that the tapes alluded to by defense counsel were not discoverable under Fed. R. Crim. P. 16 because the government did not intend to rely on them at trial. The government further told the court, "[Defense counsel] has the tapes. We have not violated *Brady*. He had the tapes well in advance of trial."

At some point after the two hearings in which defense counsel complained about the government's failure to provide discovery, an ATF case agent informed the Assistant U.S. Attorney that he had found a tape recording of conversations held on December 28, 1984. Because this tape was also inaudible, the government decided that it was not subject to discovery and unilaterally chose not to inform the court of its existence or to give defense counsel a copy.

The case went to trial in September of 1987. At the start of trial, in the course of a discussion related to a document he had not received, defense counsel reiterated his previous complaints concerning discovery and reminded the court that it had not ruled on his motion to dismiss. In response the government stated,

> "I take issue with [defense counsel's] continuing tirades about discovery. This man was given discovery on the day of arraignment, the bulk of the discovery. When I discovered new evidence, I sent it directly to [defense counsel] just as soon as I received it.
>
> * * *

> I've done everything that I can do, everything that's humanly possible in this case to get [defense counsel] the discovery to which he is entitled at the earliest possible moment. I take issue with [defense counsel's] statements and his continuing tirades over discovery in this case. He has received discovery in a more prompt manner than I would say he has received discovery in any case he's ever tried."

After a brief discussion, defense counsel asked the government,

> "Is there any other discovery that you have because I would like to see everything you have got there?"

The Assistant U.S. Attorney replied:

> "You have got everything, Tim."

During the proceedings that followed, ATF agent Mike Scanlon admitted that there were additional tape recordings in addition to the four given to defense counsel. The government stated during a bench conference that these tapes had been found after the other four tapes had already been given to defense counsel. The court asked who had made the decision that these tapes contained no *Brady* material. The Assistant U.S. Attorney answered that he had made the decision. He further explained that the tapes were not discoverable under Rule 16, Fed. R. Crim. P., because they were inaudible. (These statements, however, are inconsistent with the government's position on appeal that the Assistant U.S. Attorney had been unaware of the existence of the additional tapes prior to Scanlon's testimony.)

Counsel for the defense moved for a mistrial and renewed his motion to dismiss on account of the alleged discovery violations. The district court subsequently granted

defendant's motion for a mistrial, stating that the tapes were discoverable as recorded statements of the defendant. The court, however, found that the government had not deliberately withheld discoverable material.

Defendant moved to bar further proceedings as violative of the Double Jeopardy Clause of the Fifth Amendment. On October 7, 1987, the court denied the motion, finding that the government's nondisclosure was prosecutorial error that did not amount to overreaching.

Generally, a defendant's motion for mistrial removes any bar to reprosecution on double jeopardy grounds, unless the accused has been "forced" into the decision based on prosecutorial misconduct that was intended to provoke the defense into moving for a mistrial. *Oregon* v. *Kennedy*, 456 U.S. 667, 679 (1982). See also *United States* v. *Dinitz*, 424 U.S. 600 (1976).

Under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny, the government has a general obligation to disclose evidence that is favorable to the accused and material to the determination of guilt and punishment. See *United States* v. *Presser*, No. 87-3896,slip op. at 13 (April 25, 1988). The government typically makes the final decision as to which information is to be disclosed, unless defense counsel becomes aware that other exculpatory material has been withheld and notifies the court that this has occurred. See *Pennsylvania* v. *Ritchie*, 94 L. Ed. 2d 40, 59 (1987). In the event the government fails to disclose *Brady* material, the defendant has a constitutional remedy for the nondisclosure only if he can show a reasonable probability that the omission deprived him of a fair trial. *Presser*, *supra*, at 13 (citing *United States* v. *Agurs*, 427 U.S. 97, 108 (1976)).

The question of whether the tapes actually contained exculpatory material is not before us in the instant case. The issue before us, rather, is whether the government's

conduct was calculated to goad defendant into moving for a mistrial. The records shows that the district court expressly ordered the government to provide defendant with "any tape recording made by Government agents of any conversation with the defendant." Despite the clarity of this order, the government chose unilaterally to withhold certain tapes from discovery, rationalizing its decision on the grounds that the tapes were inaudible and the government did not plan to introduce them at trial.

Upon review, we agree with the district court that the government's behavior, while subject to censure, did not constitute a deliberate attempt to force a mistrial. Because, moreover—as the district court found—the defendant was not seriously prejudiced by what happened, we cannot say that the government was guilty of "overreaching." This case is therefore governed by *United States* v. *Jorn*, 400 U.S. 470, 485 (1971):

> "[W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error."

AFFIRMED.

APPENDIX A-2

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 87-00001-01-L(B)
(18 U.S.C. App: §1202(a)(1))

UNITED STATES OF AMERICA

v.

GOBEL LEE NEWSOME

INDICTMENT—Filed January 5, 1987

The Grand Jury charges:

COUNT 1

On or about and between the 9th day of January, 1985, and the 23rd day of January, 1985, in the Western District of Kentucky, Jefferson County, Kentucky, GOBEL LEE NEWSOME, having been convicted on August 11, 1982, in the Bullitt Circuit Court, of receiving stolen property over the value of $100.00, a felony, did have in his possession a firearm, that is, a Ruger, .357 caliber revolver, Serial Number 155-48504, which had moved in interstate commerce.

In violation of Section 1202(a) (1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

The Grand Jury further charges:

COUNT 2

On or about the 23rd day of January, 1987 in the Western District of Kentucky, Bullitt County, Kentucky,

GOBEL LEE NEWSOME, having been convicted on August 11, 1982, in the Bullitt Circuit Court, of receivng stolen property over the value of $100.00, a felony, did have in his possession the following firearms: a Gecado, .22 caliber revolver, Serial Number 788433, a Smith & Wesson, .38 caliber revolver, Serial Number D553899, an AMT .380 caliber pistol backup model, Serial Number C07896 and a Harrington & Richardson 410 gauge shotgun, Serial Number AU62 9679, which had moved in interstate commerce.

In violation of Section 1202(a)(1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

The Grand Jury further charges:

COUNT 3

On or about the 23rd day of January, 1985, in the Western District of Kentucky, Jefferson County, Kentucky, GOBEL LEE NEWSOME, having been convicted on August 11, 1982, in the Bullitt Circuit Court, of receiving stolen property over the value of $100.00, a felony, did have in his possession the following firearms: a Colt, .25 caliber automatic pistol, Serial Number OD05463, an Ithaca 16 gauge pump shotgun, Serial Number 371098113, a Stevens 12 guage double barrel shotgun, Model 311E, Serial Number A303240, a High Standard Sentinel, .22 caliber revolver, Serial Number 711281 and a Winchester .22 caliber semiautomatic rifle, Serial Number B1468939, which had moved in interstate commerce.

In violation of Section 1202(a) (1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

A TRUE BILL.
FOREMAN

Joseph M. Whittle
United States Attorney
JMW: TMC: srb

APPENDIX A-3

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Criminal Action No. 87-00001-01-L(B)

UNITED STATES OF AMERICA

v.

GOBEL LEE NEWSOME

Entered January 22, 1987

RECIPROCAL ORDER OF DISCOVERY

The Court having inquired of counsel for the defendant whether discovery is requested, counsel having affirmatively responded, and the United States having made no objection and having requested reciprocal discovery, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that the parties proceed to give reciprocal discovery pursuant to the provisions of Rule 16, Federal Rules of Criminal Procedure, subject to the limitations and conditions set forth therein, and including, not by way of limitation, the following:

THE UNITED STATES

The United States shall permit the defendant to inspect and copy or photograph:

1) Any relevant written or recorded statements made by the defendant or copies thereof within the possession, custody or control of the United States, the existence of

which is known or by the exercise of due diligence may become known to the United States Attorney.

2) The substance of any oral statement which the United States intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a Government agent;

3) Recorded testimony of the defendant before a Federal Grand Jury which relates to the offense charged

4) Books, papers, documents, photographs, tangible objects, buildings, or places or copies or portions thereof which are with the possessions, custody or control of the United States and which the United States intends to introduce as evidence in chief at the trial of this case.

5) Results of reports of physical or mental examinations and of scientific tests or experiments or copies thereof which are within the possession, custody or control of the United States, the existence of which is known or by the exercise of due diligence may become known to the United States Attorney, and which the United States intends to introduce as evidence in chief at the trial of this case.

6) Copy of the prior criminal record of the defendant, if any, that is within the possession, custody or control of the United States, the existence of which is known, or by the exercise of due diligence may become known, to the United States; and

7) Any tape recording made by Government agents of any conversation with the defendant.

THE DEFENDANT

The defendant shall provide the following information to the United States for the purpose of inspection, examination and photocopying:

1) All books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are with in the possession, custody or control of the defendant, and which the defendant intends to introduce as evidence in chief at the trial; and

2) Any results or reports of mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial, or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to his testimony.

Compliance with this Order shall be accomplished on or before the 28th day of January, 1987.

Copies to:

United States Attorney
Counsel for Defendant

(s) George J. Long
George J. Long
Chief U.S. Magistrate

APPENDIX A-4

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 87-00063-01-L(B)
(18 U.S.C. App. § 1202(a)(1))

UNITED STATES OF AMERICA

v.

GOBEL LEE NEWSOME

Filed April 20, 1987

The Grand Jury charges:

COUNT 1

On or about and between the 9th day of January, 1985, and the 23rd day of January, 1985, in the Western District of Kentucky, Jefferson County, Kentucky, GOBEL LEE NEWSOME, having been convicted on July 7, 1961, in the Commonwealth of Kentucky, of voluntary manslaughter, a felony, and having been convicted on July 20, 1982, in the Commonwealth of Kentucky, Jefferson Circuit Court, of trafficking in food stamps, a felony, did have in his possession a firearm, that is, a Ruger, .357 caliber revolver, Serial Number 155-48504, which had moved in interstate commerce.

In violation of Section 1202(a) (1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

The Grand Jury further charges:

COUNT 2

On or about and between the 17th day of October, 1981, and the 23rd day of January, 1985, in the Western District of Kentucky, Bullitt County and Jefferson County, Kentucky, GOBEL LEE NEWSOME having been convicted on July, 7, 1961, in the Commonwealth of Kentucky, of voluntary manslaughter, a felony, and having been convicted on July 20, 1982, in the Commonwealth of Kentucky, Jefferson Circuit Court, of trafficking in food stamps, a felony, did have in his possession the following firearms: a Gecado, .22 caliber revolver, Serial Number 788433, a Smith & Wesson, .38 caliber revolver, Serial Number D553899, an AMT .380 caliber pistol backup model, Serial Number C07896 and a Harrington & Richardson 410 gauge shotgun, Serial Number AU629679, which had moved in interstate commerce.

In violation of Section 1202(a) (1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

The Grand Jury further charges:

COUNT 3

On or about and between 1982, the exact date being unknown to the Grand Jury, and the 23rd day of January, 1985, in the Western District of Kentucky, Jefferson County, Kentucky, GOBEL LEE NEWSOME, having been convicted on July 7, 1961, in the Commonwealth of Kentucky, of voluntary manslaughter, a felony, and having been convicted on July 20, 1982, in the Commonwealth of Kentucky, Jefferson Circuit Court, of trafficking in food stamps, a felony, did have in his possession the following firearms: a Colt, .25 caliber automatic pistol, Serial Number OD054 63, an Ithaca 16 gauge pump shotgun, Serial Number 37109 8113, a Stevens 12 gauge double barrel shotgun, Model 311E, Serial Number A303240, a High Standard Sentinel, .22 caliber revolver, Serial Number 711281 and a Winches-

ter .22 caliber semiautomatic rifle, Serial Number B1468 939, which had moved in interstate commerce.

In violation of Section 1202(a) (1), Title 18, Appendix, United States Code.

F 10 o I 2 o b

A TRUE BILL.
FOREMAN

Joseph M. Whittle
United States Attorney

JMW: TMC: srb/pak

APPENDIX A-5

UNITED STATES DISTRICT COURT

FOR THE
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. Cr 87-00063-01-L(B)

UNITED STATES OF AMERICA - - - - *Plaintiff*

v.

GOBEL LEE NEWSOME - - - - - *Defendant*

MEMORANDUM AND ORDER—Entered Sept. 17, 1987

This matter came on for trial on September 14, 1987. The trial was resumed on September 15, 1987. After hearing the arguments of counsel, it became apparent to the Court that certain tape recordings of conversations to which defendant was a party had not been furnished to counsel for defendant. Since the other participant in the conversations was a witness who had already testified and whose whereabouts were not made known to counsel for defendant, it became apparent to the Court that defendant was deprived of his right to a fair trial and his right to confront the witness who had participated in the recorded conversations.

Defendant's motion for a mistrial was granted, and the jury was discharged.

The matter is now assigned to 9:30 a.m. September 30, 1987, for further proceedings. Defendant shall continue under the terms and conditions of his present bond.

IT IS SO ORDERED this 16th day of September, 1987.

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel

APPENDIX A-6

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Criminal Action No. CR87-00063-01-L(B)

UNITED STATES OF AMERICA - - - - *Plaintiff*

v.

GOBEL LEE NEWSOME - - - - - *Defendant*

MOTION TO BAR FURTHER PROCEEDINGS BECAUSE OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Comes the Defendant, Gobel Lee Newsome, by counsel, John Tim McCall, and moves the Court to dismiss this indictment and prohibit any further proceedings in this matter because of the Double Jeopardy Clause of the Fifth Amendment.

In support of said motion the Defendant states that on January 22, 1987 this Court entered a reciprocal order of discovery which provided that the Defendant receive tapes of any conversations with the Defendant.

On January 28, 1987, in open court, Defendant's counsel acknowledged receipt of two tapes of conversations dated January 9, 1985 and January 14, 1985. Several requests were made by Defendant's counsel for any further tapes; however, the Assistant United States Attorney denied the existence of any other tapes. However, on or about April 1, 1987, Defendant's counsel received two more tapes of conversations occurring on January 21, 1985.

On April 30, 1987, the Defendant filed a Motion to Dismiss for failure of the Government to disclose evidence and discovery in accordance with the Federal Rules of Criminal Procedure.

In the Response to the Motion to Dismiss filed by the Government they admit delivering two tapes on January 28, 1987, as well as to the tapes of the third conversation (two tapes of conversation of January 21, 1985). The Government's Attorney states they were delivered when their existence was discovered.

Prior to trial of this matter the Defendant had raised this issue of the tapes with the Court, both orally and in writing.

During the trial of the case, the Government called Agent Mike Scanlon of the Bureau of Alcohol, Tobacco & Firearms (A.T.F.) to the stand to testify for the Government. He appeared to be the last witness to testify in this case for the Government. Previously Frank Manning (informant) had testified. Mr. Manning was the witness who had had conversations with the Defendant. When Mr. Scanlon was asked concerning the four tapes that had been previously furnished to Defendant's counsel, he further admitted that there were other tapes of the Defendant which were in his custody which had not been furnished to the Defendant or to his counsel. When asked why these matters were not turned over to Defendant or his counsel, the witness Scanlon testified that he was told not to by the Assistant United States Attorney. It should be remembered that previous excuses for not furnishing discovery were that there had been a number of agents involved in this case before Mr. Scanlon took over the case. At the point in the trial where Mr. Scanlon gave the previous answer Defendant moved the Court to dismiss the proceedings against him for failure of the Government to furnish him with the tapes, and in the alternative, to grant

him a mistrial. Defendant could not be adequately represented because of the failure of the Government to furnish the tapes to his counsel. Mr. Terry Cushing, Assistant United States Attorney, who had handled this case from the beginning, admitted to the Court that he had unilaterally told the agent not to furnish these tapes to Defendant's counsel under the guise that there was nothing that would be beneficial to the Defendant. He further represented to the Court that he had listened to these tapes and was familiar with them.

After a mistrial was declared in this matter by the Court, six more tapes have been delivered to Defendant's counsel. These are tapes which had never previously been furnished to Defendant's counsel and which start with conversations dated December 26, 1984 up to and including tapes previously furnished to Defendant's counsel. Defendant is still not confident that he had received all of the tapes in this matter.

The mistrial granted by this Court was caused by prosecutorial misconduct.

In support of the motion filed on behalf of the Defendant to bar further proceedings Defendant cites to the Court the case of *United States* v. *Wilson,* 534 F. 2d 76 (1976). In that case the Court held that a district judge must have wide latitude to inquire into all circumstances surrounding the declaration of a mistrial and make findings of fact which may be reviewed on appeal. Defendant would also like to cite the cases of *United States* v. *Dinitz,* 424 U.S. 600, 47 L. Ed. 2d 267, 96 S. Ct. 1075 (1976); *Arizona* v. *Washington,* 434 U.S. 497, 54 L. Ed. 2d 717, 98 S. Ct. 824; *Downum* v. *United States,* 372 U.S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 (1963). Defendant submits that the mistrial in this case was caused by prosecutorial misconduct. Defendant further submits that the record shows that the Government

has not played fair with the Defendant in giving discovery in this case.

This Defendant is mindful that Courts have been reluctant to apply the double jeopardy bar based on prosecutorial misconduct in other than exceptional cases. See *Petrucelli* v. *Smith*, U.S.D.C., W.D. New York, 544 F. Supp. 627 (1982), at page 639. That Court cited *United States* v. *Wilson, supra,* with approval.

In this case there was a continuing course of conduct by the Government which deprived the Defendant of discovery and his right to a fair trial. The Defendant was also denied his right to a Speedy Trial.

Two other cases where the Double Jeopardy Clause precluded retrials are: *United States* v. *Martin,* 561 F. 2d 135 (8th Cir., 1977), and *United States* v. *Kessler,* 530 F. 2d 1246 (5th Cir., 1976).

Wherefore, Defendant moves the Court to dismiss this indictment and bar any further proceedings in this matter because of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

(s) John Tim McCall
John Tim McCall
Counsel for Defendant
200 Hart Block Building
730 West Main Street
Louisville, Kentucky 40202
(502) 589-6190

CERTIFICATE

I hereby certify that a copy of the foregoing was mailed to the Hon. Terry M. Cushing, Assistant United States Attorney, Bank of Louisville Building, Tenth Floor, 510 W. Broadway Street, Louisville, Kentucky 40202, on this the 23rd day of September, 1987.

(s) John Tim McCall
John Tim McCall

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Criminal Action No. CR87-00063-01-L(B)

UNITED STATES OF AMERICA - - - - *Plaintiff*

v.

GOBEL LEE NEWSOME - - - - - *Defendant*

ORDER—Filed September 23, 1987

The Defendant having filed a Motion to Bar Further Proceedings Because of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and the United States of America having been sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED that the above-styled Indictment, CR87-00063-01-L(B), be, and hereby is dismissed, and any further proceedings in this matter are hereby barred pursuant to the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

Thomas A. Ballantine, Jr.
Judge, U.S. District Court

CC: Copies to Counsel

APPENDIX A-7

UNITED STATES DISTRICT COURT

FOR THE
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. Cr 87-00063-01-L(B)

UNITED STATES OF AMERICA - - - - *Plaintiff*

v.

GOBEL LEE NEWSOME - - - - - *Defendant*

MEMORANDUM AND ORDER—Entered October 8, 1987

This matter is before the Court on the motion of the defendant to dismiss the indictment and to prohibit any further proceedings, citing the double jeopardy clause of the Fifth Amendment.

Defendant, a convicted felon, was charged with three counts of possession of firearms, Title 18 U.S.C. § 922 (g)(1).

The trial of this action was begun on September 14, 1987. The primary witness for the government was an informant named Frank Manning. Manning had been fitted with a recording device, and several of his conversations with defendant were attempted to be taped. The tapes were largely inaudible.

Manning is a former member of a motorcycle "club," the members of which have expressed an interest in Manning's present whereabouts. To protect Manning, the prosecutor asked the Court to order defense counsel not to ask Manning's address. Defense counsel agreed that he would not.

After Manning had testified and been cross-examined, he was excused from further attendance. Prior to trial, the government had furnished counsel for defendant with four tapes of conversations between Manning and defendant. At trial, after Manning had testified and returned to wherever he came from, the government disclosed that it had a number of other tapes of conversations between Manning and defendant. The prosecutor trying the case[1] unilaterally decided that the tapes were either inaudible or irrelevant. Defendant moved for a mistrial and his motion was granted.

Our initial inquiry must be directed at whether declaring a mistrial was a manifest necessity. *United States* v. *Perez*, 9 Wheat. 579 (1824). We conclude that it was. The government's primary witness had testified and had been excused. His unavialability for recall by defendant cannot be seriously questioned. When the government disclosed that it had other tapes, whether audible or not, defendant's opportunity to cross-examine Manning or not, content of those tapes or the substance of the conversations was lost.

Generally, a finding of manifest necessity removes any double jeopardy bar to a retrial. However, as the Court noted in *United States* v. *Dinitz*, 424 U.S. 600, 96 S. Ct. 1075 (1967):

> "Different considerations obtain, however, when the mistrial has been declared at the defendant's request. The reasons for the distinction were discussed in the plurality opinion in the *Jorn* [400 U.S. 470, 91 S. Ct. 547 (1971)] case:

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[1]It should be noted that this case has been handled by several Assistant U. S. Attorneys and several ATF agents.

'If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. In the absence of such a motion, the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. See *United States* v. *Perez*, 9 Wheat., at 580, 6 L. Ed. at 166.' 400 U.S., at 485, 91 S. Ct. at 557, 27 L. Ed. 2d at 556 (footnote omitted).

The distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause. Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire 'to go to the first jury and, perhaps, end the dispute then and there with an acquittal.' *United States* v. *Jorn*, *supra*, at 484, 91 S. Ct. at 557, 27 L. Ed. 2d at 556. Our prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a *sua sponte* judicial declaration of mistrial. But it is evident that when judicial or prosecutorial error ser-

> iously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions." 424 U.S. at 607, 96 S.Ct. at 1079.

Our problem lies in the fact that the prosecutorial error in this case does not seriously prejudice defendant. It is true that the prosecutor's failure to disclose the existence of the tapes in the absence of the granting of the motion for a mistrial could possibly have prejudiced defendant. We do not imply that the error by the prosecutor was a deliberate attempt to withhold evidence, nor did his error amount to overreaching.

We believe that the language of *United States* v. *Jorn*, 400 U.S. 470, 91 S. Ct. 547 (1971), supports our conclusion that defendant's motion to dismiss must be denied and a retrial must be ordered:

> "[W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is oridnarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." 400 U.S. at 485, 91 S. Ct. at 557.

The motion to dismiss the indictment will be denied and this matter will be assigned to 9:30 a.m. October 13, 1987, for further proceedings. The defendant shall continue under the terms and conditions of his present bond.

IT IS SO ORDERED this 7th day of October, 1987.

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel